STATE OF MICHIGAN

IN THE SUPREME COURT

The People of the State of Michigan Plaintiff/Appellee	Docket No. COA No. 325582 Circuit Court No. 14-009613-01-FH

v,

Kameron Leo Kilgo
Defendant/Appellant

_____/

Wade D. McCann (P54449) Attorney for Defendant/Appellant 32437 5 Mile Road Livonia, MI 48154 (313) 645-4350	Timothy A. Baughman (P24381) Chief, Research, Training and Appeals Attorney for Plaintiff/Appellee 1441 Saint Antoine St. Detroit, MI 48226 (313) 224-57777

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APPLICATION FOR LEAVE TO APPEAL

STATEMENT IDENTIFYING ORDER OR JUDGMENT APPEALED AND RELIEF SOUGHT

This is an Application for Leave to Appeal a December 19, 2014 Order of the Wayne County Circuit Court, Criminal Division, by the Honorable Timothy Michael Kenny, denying Appellant the defense of mistake of age or mistake of fact. (**Exhibit A**) An Application for Leave to Appeal to the Court of Appeals was filed January 9, 2015.

On or about December 15, 2014, Appellant filed a motion with the Wayne County Circuit Court, Criminal Division, seeking permission to raise the defense of mistake of fact and/or mistake of age. Appellant and the Circuit Court were aware of this Court's decision in People v. Cash, 419 Mich 320; 351 NW 2d 822 (1984). (**Exhibit B**) Appellant and the Circuit Court recognized that the Circuit Court was bound by this Court's 1984 decision.

Appellant advised the Circuit Court that he sought to have this Court revisit the 30 year old decision in Cash. In 1984, when Cash was decided, only 7 states afforded a defendant the right to raise the defense of mistake of age. Today, over 20 states permit a defendant to raise a defense of mistake of age and of the remaining 29, the majority of those states limit prosecution for statutory rape or indecent liberties with a minor to 13 years or younger. Appellant would not be subject to prosecution in the overwhelming majority of states.

Not only have 40% of the states now adopted the defense of mistake of age, there have been changes in the law that were not considered in 1984, in part, because they did not exist. As an example: in 1984, the Michigan Sexual Offenders Registration Act, MCL 28.721, effective 1994, had not been adopted. The sexual registration act places life-long burdens on a defendant convicted of a sexual offense. It will affect every aspect of his life for life. The registry is open to the public

and to law enforcement. It governs where a defendant can live, with whom and where his children, if he has children, may play and will follow him to every employment, home or friend that he will ever have.

Judge Kenny stated:

> And as was acknowledged by Mr. McCann and also in the People's brief by Mr. Plymale, People versus Cash found at 419 Michigan 230, a 1984 Michigan Supreme Court decision does in fact say that for criminal sexual conduct in the third degree it is a strict liability statute.
>
> That mistake of fact is not a defense, and that this Court is precluded from deviating from the ruling by the Michigan Supreme Court.
>
> **I will indicate this though. That since the consequences are substantial for the defendant, this is a situation where I am going to grant a stay to allow the defense to seek an interlocutory appeal.**
>
> It's rare that I do grant a stay in these matters. But since this really would go to whether or not there is a defense essentially in this particular case. And as Mr. McCann has indicated from the time of the Cash decision until now, there have been 17 other states that have moved in a different direction.
>
> Whether the Michigan Appellate Courts will do so or not, I won't hazard a guess, but I'm certainly going to give Mr. McCann the opportunity to take this to the Court of Appeals. (Emphasis added.) (Tr. 12/19/14 p. 6- 7) (**Exhibit D)**

None of the judges of this Court have passed on the ruling in Cash.

In Justice Kavanaugh's dissent in Cash, supra, he wrote:

> Michigan has a long history of insistence on the establishment of *mens rea* in felony cases. In Pond v. People, 8 Mich 150, 174 (1866), Justice Campbell observed:
>
> "A criminal intent is a necessary ingredient of every crime. And therefore it is well remarked by Baron Parke in Regina v. Thurborn,

> 2 C & K 832, that 'as the rule of law founded on justice and reason, is that *actus non faci reum, nisi mens sit rea*, the guilt of the accused must depend on the circumstances as they appear to him.' And Mr. Bishop has expressed the same rule very clearly, by declaring that 'in all cases where a party, without fault or carelessness, is misled concerning fact and acts as he would be justified in doing if the facts were what he believed them to be, he is legally as he is morally innocent': 1 Bish Cr 1, § 242."
>
> Justice Fitzgerald adverted to this principle in quoting *Gegan Criminal Homicide in Revised New York Penn Law*, 12 N.Y. L Forum 565, 586 (1966), in People v. Aaron, 409 Mich 672, 705; 299 NW 2d 304 (1980):
>
> "'If one had to choose the most basic principle of the criminal law in general*** it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respects to that result'"
>
> Disallowing a defense of reasonable mistake of fact obviates proof of men rea. While this practice has been approved in misdemeanor cases, we are cited no case nor has our research uncovered one, where this Court has sanctioned it in felony cases.
>
> Recognizing the defense of a reasonable mistake of age to a charge of statutory rape, however, does not imply that the defendant must have in fact known the person was under age. Instead, when the defense is raised, the factfinder need only determine whether the defendant honestly believed that the prosecutrix was an adult, and if so, whether the belief was reasonable.
>
> Reasonable mistake of age should not be confused with the rule that a person under the statutory age is legally incapable of consent. Consent of the underage person is not the issue here. It is the defendant's state of mind. The gravanen of the charged offense is voluntary intercourse with an underage person. Just as proof of coercion of a defendant would defeat the charge, so should defendant's reasonably mistake of the fact of age. In neither instance could there be *mens rea*, for in each case there would be no free election to do the thing forbidden.

In Lambert v. California, 355 U.S. 225, 228 (1957), the United States Supreme Court wrote:

"Engrained in our concept of due process is the requirement of notice." Due process has been defined in Michigan as the embodiment of the idea of "fair play." Dodge v. Detroit Trust Co., 300 Mich 575; 2 N.W. 509 (1927). As will be discussed more fully in Appellant's brief, if this Application is granted, fair play and due process are not afforded under the doctrine of strict liability.

Some states have said that recognizing a reasonable-mistake-of-age defense would "considerably diminish the deterrent effect of child-sex-offense statutes." State v. Holmes, 154 NH 723, 728; 920 A. 2d 632, 636 (2007). However, such statements are at best speculative. In no case has there been evidence to support this allegation.

Not only have 40% of the states now adopted some form of defense of mistake of age or mistake of fact. There is no evidence of an increase in statutory rape. The society that existed in the State of Michigan in 1984 has materially changed and the foundation of Cash , U.S. v. Balint, 258 U.S. 250 (1992), and People v. Gengels, 218 Mich 632; 188 NW 2d. 398 (1992) are no longer relevant. The social mores and societal conditions of 1922 or 1984 are incompatible with the societal norms and social mores of the beginning of the 21st century. Physically and mentally, the youth of Michigan have changed.

Whether the changes in our society and in its people are good or bad is not relevant. The fact of the matter is that the world has changed substantially since 1922 and 1984. The technological age, in 1984, was something that one read about in Dick Tracy, but today, 2015, is reality.

Appellant seeks the opportunity to present to this Court, bypassing the Court of Appeal, which is, as a matter of law, bound by Cash, why the defense of mistake of fact or age should be permitted and the doctrine of strict liability be abolished, at least as it pertains to those involving minors over age 12. Under the Michigan and the United States Constitutions, due process and equal

protection require that Cash be revisited and strict liability be abolished as it pertains to CSC III offenses involving minors over age 12.

RELIEF SOUGHT

Appellant's Application for Leave to Appeal must be granted and after briefing and oral argument, People v. Cash, supra, be modified or overruled.

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Case Law:

CONCISE STATEMENT OF FACTS

No evidence was produced in the trial court. The Statement of Facts submitted herein is based on the police report and was the source of discussion between the parties. The police report served as a basis for the facts submitted in Defendant's motion that is the subject of this Application for Leave to Appeal. Attached hereto is a copy of the police report. (**Exhibit C**) This is the same statement of facts that was submitted to the Court of Appeals.

Appellant enrolled in a social website on the Internet for men and women over the age of 18 for dating. Membership in the website is restricted to adults 18 and over. On the website, Appellant met Celeste Mullins. They corresponded on the website and eventually met.

Kilgo has a high school diploma and one year of graphic design. He believed Ms. Mullins when she wrote on the website that she was 19 years old and a bartender at Hooters. By agreement, Appellant was to meet Ms. Mullins at her friend's home in Romulus, Michigan. They eventually ended up at the Red Roof Inn in Romulus, where they had sexual relations.

Appellant and Ms. Mullins went to breakfast at the Big Boy near the hotel when he received a message by cell phone advising him that Celeste was not 19 years of age and was a runaway juvenile. Appellant confronted Ms. Mullins and she admitted lying, but claimed that she was in fact 17. At this point, Ms. Mullins became agitated and began to stab herself in the leg. Appellant then took Ms. Mullins back to her friend's home. Appellant has no prior criminal record and Ms. Mullins will clearly testify to the foregoing essential facts.

As stated in the statement identifying the judgment or order appealed on December 14, 2014, Appellant filed a Motion to Permit Defendant to Claim the Defense of Mistake of Age or Fact, Wayne County Circuit Judge, Criminal Division, Timothy Kenny denied Appellant's motion but

stayed proceedings so that Appellant might appeal the decision in Cash. The increase in the number of states that permitted a defense of age or fact having more than doubled since 1984, Judge Kenny believed that Cash should be revisited in an appellate level.

CONCISE ARGUMENT

INTRODUCTION

I. WHETHER PEOPLE V. CASH IS STILL VIABLE?

In People v. Cash, supra, this Court began its opinion with a review of Gengels and posed the question as to whether Gengels was "still viable?" Appellant poses the same question as to whether Cash is still viable.

Gengels was decided in 1922, 61 years before Cash. In that 61 year period, Gengels was only cited once as it related to mistake of age and that was in People v. Doyle, 16 Mich 242; 167 NW 2d 907 (1967)(lv den, 382 Mich 753 (1969). The Doyle court, in its opinion, observed: "Current social and moral values make more realistic the California view (People v. Hernandez, 61 Cal 2d 529; 39 Cal Rptr 361; 393 P. 2d 673 (1964)), that a reasonable and honest mistake of age is a valid defense to the charge of statutory rape." The Court of Appeals acknowledged, however, that it was bound to follow Gengels "That good faith or reasonable mistake as to age is not a defense to a statutory rape charge." 218 Mich at 641, and rejected the mistake of age defense.

In neither Gengels or Doyle was the constitutionality of the rule prohibiting the defense of a reasonable mistake of age or fact squarely presented. The constitutionality of the strict liability rule, given the changes in the law, as a whole, since 1984, place constitutionality squarely before the Court for a second time.

As will be discussed hereinafter, there was no statute requiring registration of sexual offenders, MCL 28.721, et seq, a statute that can influence and control every aspect of Appellant's life. When Cash was decided, in 1984, only 7 states had recognized reasonable mistake of age or fact as a defense. 419 Mich 230 at fn. 5. Today, that number is 2.5 times greater, approximately 40 % percent of the states. Fleming v. State, 441 SW. 3d. 253 (2014)

The Cash court addressed its attention, initially, to the fact that the legislature amended the criminal sexual conduct code in 1974 PA 266 and did not include in the amendment the defense of reasonable mistake of age, it's definition of CSC III involving 13-to16-year-olds. Because the legislature did not include the defense of mistake of age, the Cash court concludes that the legislation did not intend to provide for such a defense.

The Court, citing People v. Harrison, 194 Mich 363, 369; 160 NW 623 (1916), stated: "That the Legislature is 'presumed to know of and legislate in harmony with existing laws.'" This Court reasoned that the legislature must have been aware of this Court's decision in Gengels, some 61 years earlier and had the legislature desired to allow for a reasonable-mistake-of-age defense, it would have done so. As discussed more fully hereinafter, this portion of Cash does not withstand scrutiny.

Most criminal statutes doe not state or prohibit a particular defense. As an example MCL 750.356; MSA 28.588 Larceny, states in pertinent part:

> (1) A person who commits larceny by stealing any of the following property of another person is guilty of a crime as provided in this section:
>
> (a) Money, goods, or chattels.
>
> (b) A bank note, bank bill, bond, promissory note, due bill, bill of exchange or other bill, draft, order or

> certificate.
> (c) A book of accounts for or concerning money or goods due, to become due, or to be delivered.
> (d) A deed or writing containing a conveyance of land or other valuable contract in force.
> (e) A receipt, release, or defeasance.
> (f) A writ, process, or public record.
> (g) Nonferrous metal.

Nowhere in the forgoing statue are the words intentionally, knowingly, or wilfully mentioned. In People. V Hillhouse, 80 Mich 580,586; (1890),this Court wrote:" The felonious intent is an essential and inseparable ingredient in every larceny, and if a person takes property under a claim of right, however unfounded, he has not committed larceny." Intent, as necessary ingredient of larceny was judicially created. The larceny statute was last amended effective in 2009. The statute still does not mention intent, knowing or wilful. Applying the reasoning of Cash, Hillhouse should have read if a person takes property under a claim of unfounded right the defendant is strictly liable.

This Court then stated:

> It is well established that the Legislature may, pursuant to its police powers, define criminal offenses without requiring proof of a specific criminal intent and so provide that the perpetrator proceed at his own peril regardless of his defense of ignorance or an honest mistake of fact. United States v. Balint, 258 U.S. 250, 252; 42 S.Ct. 301: 66 L. Ed 604 (1922); Williams v. North Carolina, 325 U.S. 226, 238; 65 S.Ct. 1092; 89 L.Ed 1577 (1945), *reh den* 325 U.S. 895 (1945). In the case of statutory rape, such legislation, in the nature of "strict liability" offenses, has been upheld as a matter of public policy because of the need to protect children below a specified age from sexual intercourse on the presumption that their immaturity and innocense prevents them from appreciating the full magnitude and consequences of their conduct.

The Court's selection of Balint and Williams in support of the decision in Cash is telling. Balint was decided the same year as Gengels and 1922 American society, ethically and morally is different

from America 2015. Williams relates to a divorce case and the application of the full faith and credit clause of the U.S. Constitution, Article 4, § 1. In Williams, Mr. Justice Frankfurter wrote:

> The objection that punishment of a person for an act as a crime when ignorant of the facts making it so, involves a denial of the process of law has more than once been overruled. In vindicating its public policy and particularly one so important as that bearing upon the integrity of family life, a State, in punishing particular acts may provide that "he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." United States v. Balint, 258 U.S. 250, 252, 42 S.Ct. 301, 302, 66 L.Ed. 604 quoting Shevlin-Carpenter Co. V. Minnesota, 218 U.S. 57, 69, 70; 30 S.Ct. 663, 666, 667, 54 L.Ed. 930

The Williams opinion was issued in 1945 and is inconsistent , if not rejected by the Supreme Court's holding in Lambert v. California, 355 U.S. 225, 228 (1957), where the Court wrote: "Engrained in our concept of due process is the requirement of notice."

In Balint, the Court recognized that at common law, *scienter* was a necessary element in the indictment and proof of every crime and it followed that that applied to statutory crimes even when the statutory definition did not include it. Mr. Justice Taft wrote:

> Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se.* So, too, in the collection of taxes, the importance to the public of their collection leads the legislature to impose on the taxpayer the burden of finding out the facts upon which his liability to pay depends and meeting it at the peril of punishment. Again, where one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells. (Citations omitted.)

When Justice Taft, wrote the foregoing there was no UCC, no FDA, or DEA. In Cash this Court,

by its decision, disagreed in part with Justice Taft. Statutory rape is not a " regulatory measure in the exercise of what is called the police power where the emphasis of the statute is evidently upon the achievement of some social betterment rather than the punishment of crimes....". Statutory rape is a 15 year felony. When coupled with the sexual offenders statute MCL 28.721 this offense could burden Appellant for the remainder of his life while denying him an ability to defend.

This Court, in Cash, found that denial of the defense of reasonable mistake of age was not a violation of the United State Constitution. Quoting the 1st Circuit in Nelson v. Moriarty, 484 F.2d. 1034, 1035-1036 (CA 1, 1973) this Court, stated:

> The effect of *mens rea* and mistake on state criminal law has generally been left to the discretion of the states.*** The Supreme Court has never held that an honest mistake as to the age of the prosecutrix is a constitutional defense to statutory rape,*** and nothing in the Court's recent decisions clarifying the scope of procreative privacy,*** suggests that a state may no longer place the risk of mistake as to the prosecutrix's age on the person engaging in sexual intercourse with a partner who may be young enough to fall within the protection of the statute.

In Michigan, Justice Campbell, in Pond v. People, 8 Mich 150,174 (1860) observed that criminal intent is a necessary ingredient of every crime and that " the guilt of the accused must depend on the circumstances as **they appear to him**." Clearly, Justice Campbell, one of Michigan's legendary justices wrote in support of the defense of reasonable mistake of age.

II. WHETHER THE DENIAL OF THE DEFENSE OF REASONABLE MISTAKE OF AGE OR FACT VIOLATES DUE PROCESS UNDER ARTICLE 1 § 17 OF THE MICHIGAN CONSTITUTION OF 1963 AND THE 14 AMENDMENT OF THE UNITED STATES CONSTITUTION?

The 14th Amendment of the United States Constitution and Article 1 § 17 of the Michigan Constitution provides that no person, by action of the state shall not be deprived of life, liberty or

property without due process of law. Due process clause of both the state and federal constitutions have substantive and procedural components. Reno v. Flores 507 U.S. 292, 301-302 (1993). The substantive components protects against government action that either lacks a rational basis or unduly infringes on a fundamental right or liberty interest. Washington v. Glucksberg 521 U.S. 702, 720-721 (1997). A statute that infringes on a fundamental right or liberty interest violates a substantive component of the due process clause " unless the infringement is narrowly tailored to serve a compelling state interest." Id at 721, Flores, 507 U.S. at 302.

One of the fundamental rights involved in this case is the right to be free from harsh punishment when mental culpability is entirely absent. In Cash this Court held that mental culpability was irrelevant however, such holding leads to such absurd results. Assume that a woman is sexually assaulted by a teenage male under the age of 16, under the holding in Cash she is specifically criminally liable under Michigan CSC III statute. In another instance a physically mature woman under the age of 16 could seduce a 21 year old male with the intent of blackmail and the state would be her accomplice.

The idea of some mental culpability must attach to conduct before it can be a crime "is no provincial or transient notion." Morissette v. U.S. 342 U.S. 246, 250 (1952) "It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Id. *Mens Rea* is firmly embedded in our law and is " the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Staples v. U.S., 511 U.S. 600, 605 (1994). The label " public welfare offense" is hardly apt when the crime is a felony. Id at 618.

In Cash this Court wrote as follows:

> Moreover, given the already highly emotional setting of a statutory rape trial, the allowance of a mistake of age defense would only cause additional undue focus on the complainant by the jury's scrutinizing her appearance and any other visible signs of maturity. The obvious problem is that because early adolescents tend to grow at a rapid rate, by the time of trial a relatively underdeveloped young girl or boy may have transformed into a young woman or man. A better procedure would be to permit any mitigating and ameliorating evidence in support of a defendant's mistaken belief as to the complainant's age to be considered by the trial judge at the time of sentencing.

This statement in Cash, applied only to statutory rape essentially states that because a trial may be emotional for the purported victim the Defendant should acquiesce and go quietly to jail leaving his defense to be argued at sentencing. The concept quoted above is the very essence of the denial of substantive due process. The fact that the minor may have committed a fraud that created the situation in the first place is to be ignored. The defense of reasonable mistake of age might be uncomfortable for the person that created the incident in the first place.

Historically strict liability offenses have most often been called " regulatory" or" public welfare" offenses. 511 U.S. at 616 -17. It is unusual to impose criminal punishment on purely accidental conduct. In Staples, supra, the Supreme Court noted that the "term 'strictly liability' is really a misnomer." 511 U.S. at 607. The Court further stated: " We have noted that the common law rule requiring *mens rea* has been followed in regard to statutory crimes even where the statutory definition did not include it. 511 U.S. at 605-06.

Cash requires no mental culpability. Sex between an adult, over 21 and a minor between 13 and under 16 is statutory rape regardless of the circumstances. This as set forth above violates the very essence of due process.

Logic and precedent seem to require a holding that a reasonable mistake of age defense should be permitted particularly when the logic and precedent are coupled with relatively new developments in the law: sexual offenders registry, MCL 28.721 and Lawrence v. Texas 539 U.S. 558 (2003).

As set forth above, under the Michigan and federal constitutions the people have a fundamental right not to be punished harshly when mental culpability is absent. The model penal code allows for the defense of reasonable mistake of age, as it pertains to sex with a minor over the age of 10 years. In fact the vast majority of states would allow a defense of reasonable mistake of age involving a minor over the age of 13 years. In Michigan this is not true.

The adoption of the sex offenders registry has made conviction of sex offense more burdensome than existed in 1922 or 1984. The sex offenders registry damages an offenders reputation by giving notice to the public and law enforcement of the sex offenders status. When Cash, quoted above suggested that the trial court, at sentencing could modify the punishment based on reasonable mistake, however, the trial court is powerless to do anything about the burdens imposed by the sexual registration system. The Cash Court could not consider the sexual registry because it did not exist when it arrived at its conclusions. How would it modify it's decision, if at all?

In Lawrence, supra, the Supreme Court criticized it's decision in Bowers v. Hardwick 478 U.S. 186 (1986) for addressing the wrong issue. The Hardwick Court had framed the issue as whether the Federal Constitution had a fundamental right to engage in sodomy. The Lawrence Court found that " liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. 539 U.S. at 571-72. The Lawrence Court found that this liberty belongs to all adults, male or female, heterosexual or homosexual. The Lawrence Court acknowledged that for

centuries there had been powerful voices as condemning homosexuality as immoral. The Supreme Court instead stated that : "our obligation is to define the liberty of all, not to mandate our own moral code." 539 U.S. at 571. Further, the Court noted that sodomy would fall within Texas' sexual offender statute and that fact "under scores the consequential nature of the punishment and the state-condemnation attendant to the criminal prohibition." Id. at 576.

Few states have discussed Lawrence as it pertains to the reasonable mistake of age defense. These Courts that have considered Lawrence simply state that Lawrence does not apply in statutory rape cases because they have an overly narrow concept of the right at stake. If a defendant, non-negligently, believed that he was having consensual sex with a person over the age of 16 years or older then he believed in the existence of circumstances that would constitutionally protect him from liability under Lawrence. This belief would negate the existence of even the most minimal sort of mental culpability.

In People v. Hernandez, 61 Cal. 2d. 529; 39 Cal. Reptr. 361;393 P.2d 673 (1964) the California Supreme Court applied the reasonable mistake of age defense to those cases involving minors 14 years of age or younger. Other than strict liability the legislature or the court could have imposed a requirement of diligence.

The procedural component of due process requires the appellant be afforded the opportunity to demonstrate that the statute is indeed unconstitutional as to him. Appellant must be able to show that at the time of his conduct he actually believed that the complainant was over the age of 16 (she said 19) and Appellant's lack of awareness was reasonable. Further, his reasonable belief was based on a exercise of diligence but for complainant's age Appellants conduct would constitute

constitutionally protected sexual activity. This Court in reviewing Cash could make such defense an affirmative defense.

III. WHETHER THE DENIAL OF THE DEFENSE OF REASONABLE MISTAKE OF AGE OR FACT VIOLATES EQUAL PROTECTION UNDER ARTICLE 1 § 2 OF THE MICHIGAN CONSTITUTION OF 1963 AND THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION?

The Equal Protection Clause of the Michigan Constitution, Article 1 §2 of 1963 affords the same rights as the Equal Protection Clause of the United States Constitution. Fox v. Employment Security Comm. 379 Mich 579; 153 N.W.2d. 644 (1967). Strict liability for one class individuals but not for others violates the Equal Protection Clause of both constitutions.

In Lawrence, supra, Justice O'Connor in her concurring opinion believed that same sex sodomy was unconstitutional because of the 14th Amendments Equal Protection Clause. Justice Kennedy citing Cleburne v. Cleburne Living Center Inc. 473 U.S. 432, 439 (1985) wrote that the Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike. 539 U.S. at 579. Where the law exhibits a desire to harm a politically unpopular group a more searching form of a more rational basis review is required. Teenage sex is politically unpopular, teenagers having sex with adults is even more unpopular.

In the majority of states and in the model penal code the age of consent is 13 years or younger. This Court in Cash never addressed equal protection and never discussed the legislatures attempt to regulate morality.

The purported purpose of Michigan's CSC III statute is the protection of minors. However, with the physical maturation of today's teens the ability of the state to protect and the need for the state to protect has greatly diminished. Further, as pointed out above few Michigan criminal statutes contain

expressed defenses within the statute and few use the term intent, wilful or knowingly. In those statutes which do not use the term intent, knowingly or willfully this Court has found intent to be a necessary element. Statutory rape is an exception, it is a distinction without reason. A male who has just turned 21 and a young woman of 15 years and 11 months compared to a 18 year old male and a 16 year and 1 day old young woman are for all biological, emotional and intellectual purposes the same. However, the 21 year old male is guilty of statutory rape and the 18 year old male is not. There is not logical distinction the two young women could be only 2 or 3 days apart in age but, the male companion in the first case can not raise the defense of reasonable mistake of age while the male companion in the second case is never prosecuted. What logic or reason justifies the distinction?

In the larceny statute quoted above there are numerous defenses available to a Defendant although the words intent, knowing or willful are not used in the statute. A Defendant may assert that he thought that he owned the property or had a right to its possession. The Defendant may assert a mistake of fact, a Defendant in a statutory rape case cannot.

The two Defendant's, each facing possible incarceration, are not afforded the same rights. They are treated differently because sexual relations between an adult and a minor, whom he believes to be an adult is morally and socially unacceptable. As Justice O'Connor, in Lawrence, points out branding one group of people as criminal based solely on the states disapproval runs contrary to the values to the Constitution and the Equal Protection Clause.

Strict liability is abhorrent to our concept of due process and equal protection. This Court was correct when it stated in 1984 that only 7 states had recognized by decision or statute the defense of mistake of age or mistake of fact. Today that number has increased to 20 or 21.

In Garnett v. State 332 Md. 571; 632 A. 2d. 797 (1993), Raymond Garnett, a 20 year old mail with an IQ of 52, who interacted with persons 11 or 12 years of age and could only read at the 3rd grade level met or was introduced to Erica Frazier, then age 13. Erica told him that she was 16, the two talked occasionally on the phone. On February 28, 1991 he was in need of a ride and approached the girls house to obtain transportation. Erica told him to get a ladder and climb up to her window. He did as instructed. The two talked, and later engaged in sexual intercourse.

The defense during this trial, twice tried to offer evidence that Erica and her friends had told Raymond that she was 16 and he acted with this belief. He was found guilty and sentenced to 5 years.

The Maryland High Court, acknowledged that "it is uncertain to what extend Raymond's intellectual and social retardation may have impaired his ability to comprehend the imperatives of sexual morality in any case." Had Erica been of age she would have been guilty of rape for having sexual intercourse with a mentally retarded person. Because of strict liability, the Maryland Court felt that its hands were tied. Garnett illustrates the absurdity of the strict liability holding and, unfortunately, the same ruling could result in this State.

In any other prosecution, the defendant's mental state would have been a issue. Garnett's reliance on Erica's representations would be deemed material and admissible, but not under strict liability. If Michigan has a one court system, then under strict liability, it is unjust and unfair.

In any other felony prosecution, a defendant could raise the defense of mistake of fact, but not in statutory rape. Here, because of the moral demands to protect young women, we ignore the clear violations of equal protection, Under the holding in Lawrence, Cash must be revisited.

CONCLUSION

Pursuant to MCR 7.302 Appellant files this Application for Leave seeking to have this Court

revisit People v. Cash. It has been 31 years since Cash was decided and as stated above there have been numerous changes in the law that would suggest that leave be granted and that the issue of a Defendants right to present the defense of reasonable mistake of age or fact be reconsidered. Under MCR 7.302 if leave is granted briefs and appendix will be prepared and submitted to this Court for ruling on the issues presented.

In recent years this Court in deciding whether to grant leave has ordered mini oral arguments on the issue of whether leave should be granted. Appellant believes such mini argument would be helpful to the Court in this case. Appellant has tried in this application to set forth the principle issues to be decided by this Court in considering whether to revisit Cash. Our society has changed in the last 31 years. Those states permitting some form of defense of reasonable mistake of age has increased to 40 % percent two and half times those states permitting such defense in 1984. Of the remaining states the majority set the age of consent at 13 or younger. Appellant would be able to assert the defense of reasonable mistake of age or not be prosecuted in the overwhelming majority of the states.

The Supreme Court of United States has decided Lawrence v. Texas, supra, and Michigan adopted the sexual offender registry MCL 28.721 et. seq. There have been material changes in the law and the society that require Cash to be revisited.

Appellant prays that this Court Grant Leave to Appeal or in the alternative Grant Mini Oral Argument for Appellant to show why leave should be granted.

Date: February 20, 2015

Respectfully Submitted,
/s/
Wade D. McCann (P54449)
Attorney for Appellant